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CHAPTER 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

1. Proposed Legislation to Implement *Avena* and the Vienna Convention

In 2013, Congress continued to consider legislation that would facilitate compliance with the ruling of the International Court of Justice ("ICJ") in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. US.),* 2004 I.C.J. 12 (Mar. 31) ("*Avena*"), as well as the United States' consular notification and access obligations under the Vienna Convention on Consular Relations ("VCCR") and comparable bilateral international agreements. Much of the text of a bill that was first introduced in 2011 by U.S. Senator Patrick Leahy entitled the "Consular Notification Compliance Act," or CNCA, and later included in part in the State, Foreign Operations, and Related Agencies Appropriations Act, Fiscal Year 2013 (S. 3241), was incorporated into the Senate State, Foreign Operations, and Related Agencies Appropriations Act, Fiscal Year 2014 (S. 1372), as reported by the Senate Appropriations Committee on July 25, 2013.

The Senate Appropriations Committee's Report on the bill noted that the purpose of the section on consular notification compliance was "to provide a limited but important remedy for certain previous violations" of Article 36 of the VCCR and comparable provisions of bilateral international agreements. The Committee Report, Report 113-81, to accompany S. 1372, at 75 (July 25, 2013), is available at *www.gpo.gov/fdsys/pkg/CRPT-113srpt81/pdf/CRPT-113srpt81.pdf*. Specifically, this section provides that foreign nationals who had been convicted of capital crimes as of the date of the legislation's enactment, and in whose cases domestic authorities had not complied with U.S. consular notification and access obligations, may seek federal court review to determine whether their convictions or sentences were prejudiced by the violation. In addition, this section would create a remedy for foreign national defendants facing capital charges who raise a timely consular notification claim. This

section provides that these individuals could have the appropriate consulate notified immediately and obtain a postponement of proceedings, if the court determined this to be necessary to provide an adequate opportunity for consular access and assistance.

The consular notification compliance section contained in the Senate's State, Foreign Operations, and Related Agencies Appropriations Act, Fiscal Year 2014 (S. 1372) was also included in Section 7062 of the President's Fiscal Year 2014 budget request for the Department of State and Other International Programs, which is available at *www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/sta.pdf*.

For further background on efforts to facilitate compliance with the VCCR, as well as the ruling of the ICJ in *Avena*, see *Digest 2004* at 37-43; *Digest 2005* at 29-30; *Digest 2007* at 73-77; *Digest 2008* at 35, 153, 175-215; *Digest 2011* at 11-23; *Digest 2012* at 15-16. For more information on the State Department's outreach efforts to members of local law enforcement to ensure their awareness of consular notification requirements, see the website of the Bureau of Consular Affairs at *http://travel.state.gov/content/travel/english/consularnotification.html*.

2. State Actions Relating to *Avena*

In August 2013, the U.S. Department of State learned that the Harris County District Attorney's Office planned to ask a Texas court to set an execution date for Edgar Arias Tamayo, a Mexican national named in the ICJ's *Avena* decision, who was convicted and sentenced to death for the murder of a Houston police officer in 1994. The Department of State has communicated with state authorities in the past to request that they provide Mexican nationals named in *Avena* with the judicial "review and reconsideration" mandated by the ICJ decision and/or delay the executions of such individuals until they are provided with such review and reconsideration. As part of the Department of State's continuing dialogue with the Texas state authorities, on September 16, 2013, Secretary of State John Kerry wrote letters to Texas Governor Rick Perry, Texas Attorney General Greg Abbott, and Harris County First Assistant District Attorney Belinda Hill to request that Texas delay seeking an execution date for Mr. Tamayo. The content of Secretary Kerry's letters is reproduced below.

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* * * *

I write to you regarding an urgent and important matter that implicates the welfare of U.S. citizens and members of the United States Armed Forces traveling abroad, as well as our relations with key U.S. allies. I respectfully request your assistance in taking all available steps to protect these vital U.S. interests.

The U.S. Department of State has recently learned that a Texas court has scheduled a hearing on September 17 in which the Harris County District Attorney's Office intends to ask the court to set an execution date for Edgar Arias Tamayo. Mr. Tamayo was convicted of a capital

crime and sentenced to death in Harris County. I want to be clear: I have no reason to doubt the facts of Mr. Tamayo's conviction, and as a former prosecutor, I have no sympathy for anyone who would murder a police officer. This is a process issue I am raising because it could impact the way American citizens are treated in other countries. As you know, Mr. Tamayo is one of 51 Mexican nationals named in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.),* 2004 I.C.J. 128 (Mar. 31) (*Avena*). As you know, in *Avena*, the International Court of Justice directed the United States to provide judicial "review and reconsideration" to determine whether the convictions and sentences of several dozen Mexican nationals were prejudiced by violations of the Vienna Convention on Consular Relations (VCCR). This decision is binding on the United States under international law. As one of the Mexican nationals named in the *Avena* decision, Mr. Tamayo's case directly impacts U.S. foreign relations as well as our country's ability to provide consular assistance to U.S. citizens overseas. Without commenting on the guilt of the defendant or on the sentence in this case, I write to inform you of the important interests at stake in this case. Specifically, I request that competent Texas authorities delay seeking an execution date for Mr. Tamayo.

The Federal Executive Branch has worked diligently to ensure compliance with the U.S. international legal obligations under *Avena*. Compliance sends a strong message that the United States takes seriously its obligations under the VCCR to provide consular notification and access to foreign citizens arrested in the United States. In addition, compliance also ensures the U.S. government will be able to rely on these same provisions to provide critical consular assistance to U.S. citizens detained abroad, including the men and women of our Armed Forces and their families, many of whom are residents of the state of Texas. Our consular visits help ensure U.S. citizens detained overseas have access to food and appropriate medical care, if needed, as well as access to legal representation. As former Secretary of Defense Panetta wrote in 2011, it is important that the United States do all it can to ensure that U.S. service members, civilian personnel, and dependents are afforded consular protection while stationed abroad.

The previous Administration attempted to direct compliance with the *Avena* judgment by means of a memorandum issued by President Bush. However, although the U.S. Supreme Court unanimously recognized that "the *Avena* decision . . . constitutes an international law obligation, on the part of the United States," *Medellin v. Texas*, 552 U.S. 491, 504 (2008), the Court concluded that the President of the United States cannot unilaterally compel Texas to comply with that obligation. The Court further explained that Congress could ensure compliance with the *Avena* decision by enacting legislation to implement the ICJ decision. A statutory provision that would provide for judicial "review and reconsideration" for those Mexican nationals named in the decision—as well as similarly situated foreign nationals—is currently included in the Department of State, Foreign Operations, and Related Programs Appropriations Act, Fiscal Year 2014 (S. 1372), which has been approved by the Senate Appropriations Committee.

The setting of an execution date for Mr. Tamayo would be extremely detrimental to the interests of the United States. This issue is particularly important to our bilateral relationship with Mexico. The Mexican ambassador to the United States sent me the enclosed letter on August 28 to warn that the execution of Mr. Tamayo, in these circumstances, would be damaging to our bilateral cooperation and to express support for the proposed legislation described above. Compliance with our international legal obligations under *Avena*, is also an important issue for other U.S. allies, many of whom have written to Congress and the Department of State on this issue. For example, in August 2010, British Foreign Secretary William Hague wrote a letter to

former Secretary of State Hillary Clinton to raise his concerns about the case of Linda Carty, a similarly-situated dual British and St. Kitts national, currently on death row in Harris County.

If an execution date is set for Mr. Tamayo, Ms. Carty, or any other similarly situated foreign national, it would unquestionably damage these vital U.S. interests. Moreover, seeking an execution date would be particularly egregious, in light of the fact that no court has yet addressed Mr. Tamayo's claim of prejudice on the merits, which the state of Texas pledged it would do in a July 18, 2008, letter to my predecessor, Condoleezza Rice, and former Attorney General Michael Mukasey. It is my sincere hope that Texas authorities will make every effort to avoid jeopardizing the U.S. relationship with our allies and our ability to provide consular assistance to U.S. citizens abroad, particularly while Congress gives full consideration to the pending legislation.

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B. CHILDREN

1. Adoption

a. Pre-Adoption Immigration Review ("PAIR")

In January 2013, the Taiwan Child Welfare Bureau issued an administrative order that requires all adoption cases filed on behalf of U.S. prospective adoptive parents with the Taiwan courts to undergo the U.S. PAIR process. The order instructs Taiwan adoption service providers ("ASPs") to include a letter issued by the American Institute in Taiwan ("AIT") located in Taipei, confirming completion of the PAIR process with each court filing initiated after April 1, 2013. U.S. Citizenship and Immigration Services ("USCIS") issued a policy memorandum on February 14, 2013, allowing prospective adoptive parents to file a Form I-600, Petition to Classify Orphan as an Immediate Relative, before Taiwan courts finalize an adoption in Taiwan. The policy memorandum, which is available in full at *www.uscis.gov/USCIS/Laws/Memoranda/2013/January/Taiwan%20PAIR%20PM%20.pdf*, explains some benefits of implementing the PAIR process:

> Currently, adoptive parents generally file a Form I-600 after traveling to and completing the adoption of a child (beneficiary) in Taiwan. As a result, any serious problems with a case may only become apparent after the adoptive parents have a permanent legal relationship with the child. Irregularities uncovered after the adoption or grant of legal custody is finalized can delay or prevent the immigration of a child to the United States, which can leave adoptive parents and children in untenable situations. Implementation of the PAIR process to meet the new requirements of Taiwan will significantly reduce or eliminate such problems, since a preliminary determination on U.S. immigration eligibility will precede the issuance of adoption decrees or legal custody orders.

Effective September 1, 2013, the Government of Ethiopia began requiring all adoption cases filed on behalf of U.S. prospective adoptive parents with the Ethiopian courts to undergo the U.S. PAIR process. State Department notices regarding adoptions from Ethiopia are available at *http://adoption.state.gov/country_information/country_specific_info.php?country-select=Ethiopia*.

b. Report on Intercountry Adoption

In March 2014, the State Department released its Annual Adoption Report to Congress. The report is available at *http://adoption.state.gov/content/pdf/fy2013_annual_report.pdf*. The report includes several tables showing numbers of intercountry adoptions by country during fiscal year 2013, average times to complete adoptions, and median fees charged by adoption service providers.

c. Countries Joining the Hague Convention

On December 5, 2013, Croatia deposited its instrument of accession to the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Hague Adoption Convention"). Serbia deposited its instrument of accession on December 18, 2013. Haiti deposited its instrument of ratification of the Hague Adoption Convention on December 16, 2013. On May 24, 2013, the Republic of Korea signed the Hague Adoption Convention. Swaziland deposited its instrument of accession on March 5, 2013 and the Convention entered into force for Swaziland on July 1, 2013. For Croatia, Serbia, and Haiti, which deposited instruments in December 2013, the Convention enters into force April 1, 2014. A status table for the Hague Adoption Convention is available at *www.hcch.net/index_en.php?act=conventions.status&cid=69*.

2. Abduction

a. 2013 Hague Abduction Convention Compliance Report

In April 2013, the Department of State submitted to Congress its Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction ("Convention") pursuant to 42 U.S.C. § 11611. The report evaluates compliance by treaty partner countries with the Convention. The Convention provides a legal framework for securing the prompt return of wrongfully removed or retained children to the country of their habitual residence where a competent court can make decisions on issues of custody and the child's "best interests." The compliance report identifies the Department's concerns about those countries in which implementation of the Convention is

incomplete or in which a particular country's executive, judicial, or law enforcement authorities do not appropriately undertake their obligations under the Convention. The 2013 report, covering the period January 1, 2012 through December 31, 2012, identified Costa Rica and Guatemala as "Not Compliant with the Convention" and named the Bahamas, Brazil, and Panama as states demonstrating "Patterns of Noncompliance." The report is available at *http://travel.state.gov/content/dam/childabduction/complianceReports/2013ComplianceReport.pdf*.

b. Hague Abduction Convention Litigation

See Chapter 15.C. for a discussion of developments in 2013 Hague Abduction Convention cases in the U.S. Supreme Court in which the United States participated.

c. Hague Abduction Convention Partners

On November 1, 2013, the 1980 Hague Convention on the Civil Aspects of International Child Abduction entered into force between the United States and the Republic of Korea. A State Department media note, available at *www.state.gov/r/pa/prs/ps/2013/11/216180.htm*, stated:

> The United States now has 72 partners under the Convention.
>
> The Convention is the primary civil law mechanism for parents seeking the return of children who have been abducted from or wrongfully retained outside their country of habitual residence by another parent or family member. Parents seeking access to children residing in treaty partner countries may also invoke the Convention. The Convention is critically important because it establishes an internationally recognized legal framework to resolve parental abduction cases. The Convention does not address who should have custody of the child; rather it addresses where issues of child custody should be heard.

Cross References

Diplomatic relations, **Chapter 9.A.**
Hague Abduction Convention cases, **Chapter 15.C.**